

**Federal Trade Commission and Department of Justice Hearings on  
Health Care and Competition Law and Policy**

**Prospective Guidance  
FTC Advisory Opinions**

**June 26, 2002**

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**Federal Trade Commission\***

The screenshot shows a web browser window displaying the Federal Trade Commission (FTC) website. The browser's address bar is empty, and the page title is "FEDERAL TRADE COMMISSION FOR THE CONSUMER". The navigation menu includes links for HOME, CONSUMERS, BUSINESSES, NEWSROOM, ANTITRUST, LEGAL, FORMAL, CONGRESSIONAL, ECONOMIC, Privacy Policy, About FTC, Commissioners, File a Complaint, HSR, FOIA, IG Office, and En Español. The main content area is titled "Health Care Antitrust Issues" and contains a list of links: Statements of Antitrust Enforcement Policy in Health Care, FTC Antitrust Actions in Health Care Services and Products (4/1/03), FTC Antitrust Actions in Pharmaceutical Services and Products (4/03), Commission Actions, Advisory Opinions, Staff Letters to Other Governmental Bodies, Speeches, News Releases, and Litigation. The page is last updated on Monday, June 2, 2003. The footer of the page repeats the navigation menu.

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## Health Care Antitrust Issues

- [Statements of Antitrust Enforcement Policy in Health Care](#)
- [FTC Antitrust Actions in Health Care Services and Products](#) (4/1/03)
- [FTC Antitrust Actions in Pharmaceutical Services and Products](#) (4/03)
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The screenshot shows a web browser window displaying the Federal Trade Commission (FTC) website. The page title is "Bureau of Competition Guidelines". The header includes the FTC logo and the text "FEDERAL TRADE COMMISSION FOR THE CONSUMER". Navigation links include "HOME", "CONSUMERS", "BUSINESSES", "NEWSROOM", "ANTITRUST", "LEGAL", "FORMAL", "CONGRESSIONAL", "ECONOMIC", "Privacy Policy", "About FTC", "Commissioners", "File a Complaint", "HSR", "FOIA", "IG Office", and "En Español". A search bar is located in the top right corner.

The main content area is titled "Bureau of Competition Guidelines" and contains a list of links to various guidelines and documents:

- [Model Second Request](#)
- [Antitrust Guidelines for Collaborations Among Competitors, Issued by the Federal Trade Commission and the United States Department of Justice](#) [PDF 130K]
  - [Statement of Commissioner Thompson](#)
  - [Statement of Commissioner Leary](#)
- [Antitrust Enforcement Guidelines for International Operations](#)
- [Antitrust Guidelines for the Licensing of Intellectual Property](#)
- [Revised Federal Trade Commission, Justice Department Policy Statements on Health Care Antitrust Enforcement](#) (08/26/06)
  - [\[PDF\]](#)
  - [News Release](#)
- [Guides to Advertising and Promotional Allowances](#) ("Fred Meyer Guides ")
- [1992 Horizontal Merger Guidelines](#)

At the bottom of the main content area, it states: "Last Updated: Sunday, June 1, 2003".

The footer of the page repeats the navigation links: "HOME | CONSUMERS | BUSINESSES | NEWSROOM | ANTITRUST | LEGAL | FORMAL | CONGRESSIONAL | ECONOMIC | Privacy Policy | About FTC | Commissioners | File a Complaint | HSR | FOIA | IG Office | En Español".

The image is a screenshot of a PDF viewer window. The window's title bar shows standard OS controls. The toolbar includes navigation and document manipulation icons. The left sidebar has 'Bookmarks' and 'Thumbnails' tabs. The main content area displays the title page of a report. At the top center is the official seal of the Federal Trade Commission, which is circular with a blue border containing the text 'FEDERAL TRADE COMMISSION' and 'UNITED STATES OF AMERICA'. Inside the seal is a shield with a golden scale of justice and a pair of wings. Below the seal, the title is centered in a bold, blue, serif font: 'TOPIC AND YEARLY INDICES OF HEALTH CARE ANTITRUST ADVISORY OPINIONS BY COMMISSION AND STAFF'. The bottom status bar shows '1 of 24' pages, a size of '8.5 x 11 in', and various display icons.

The screenshot shows a web browser window displaying the Federal Trade Commission's website. The page title is "FEDERAL TRADE COMMISSION FOR THE CONSUMER". The navigation menu includes links for HOME, CONSUMERS, BUSINESSES, NEWSROOM, ANTITRUST, LEGAL, FORMAL, CONGRESSIONAL, ECONOMIC, Privacy Policy, About FTC, Commissioners, File a Complaint, HSR, FOIA, IG Office, and En Español. The main content area is titled "Advisory Opinions: Health Care Antitrust Issues" and lists several advisory opinions, including "Arkansas Children's Hospital", "Valley Baptist Medical Center", and "PriMed Physicians".

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**Advisory Opinions: Health Care Antitrust Issues**

[Topic and Yearly Indices of Health Care Antitrust Advisory Opinions By Commission and Staff](#) [PDF 58KB]

[Overview of the Advisory Opinion Process at the Federal Trade Commission](#)  
 Presented by Judith A. Moreland at the National Health Lawyers Association/Antitrust in the Health Care Field on February 13 and 14, 1997.

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**Arkansas Children's Hospital**

Letter from Jeffrey W. Brennan to Victoria Bennet, dated March 13, 2003

*re:* Sale of pharmaceuticals by non-profit children's hospital to patients seen in clinics operated by the University of Arkansas for Medical Sciences on the hospital's campus.

**Valley Baptist Medical Center**

Letter from Jeffrey W. Brennan to Louise M. Joy, dated March 13, 2003

*re:* Sale of pharmaceuticals by non-profit hospital to contracted workers who provide services at the hospital.

**PriMed Physicians**

Letter from Jeffrey W. Brennan to Gregory G. Binford, Benesch Friedlander Coplan & Aronoff LLP, dated February 6, 2003

*re:* proposal of PriMed Physicians, a physician group practice with 55 physician employees located in Dayton, Ohio, to create with other Dayton-area physicians an advocacy group to undertake "a campaign to inform and educate the general public" about, in the physicians' opinion, the "ill effects

# What is an advisory opinion?

- A statement of the legal opinion of the Commission or its staff, with respect to a party's proposed course of action.
- Usually, the staff states whether it would recommend that the Commission undertake an enforcement action.

# Who can request an advisory opinion?

- Anyone: "Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue." 16 C.F.R . § 1.1 (a).
- The request must relate to future as opposed to ongoing conduct, and it must relate to prospective conduct of the requesting party.
  - We do not issue opinions about whether your competitor, customer, or supplier is violating the law.
  - It's free: there are no filing fees or other charges.

# What is the difference between a Commission and a staff opinion?

- The Commission may issue an opinion where:
  - (1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or
  - (2) the subject matter of the request and consequent publication of Commission advice is of significant interest. 16 C.F.R. § 1.1 (a).
- The Commission has authorized its staff to consider all other requests for advice. 16 C.F.R. § 1.1 (b).
- In practice, most health care advisory opinions are staff opinions. Of the 93 opinions listed in the website index, 8 are Commission opinions. The most recent was issued in 1994.

# Limitations on the availability of opinions

- Hypothetical questions will not be answered.
- A request normally will be considered inappropriate where:
  - (1) The same or substantially the same course of action is under investigation, or is or has been the subject of a current proceeding involving the Commission or another governmental agency, or
  - (2) An informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry. 16 C.F.R. § 1.1.(b).
- The conduct must be proposed rather than ongoing.

# What information must the requester disclose?

- Enough information for the Agency to evaluate the proposed conduct.
- The rules require that the request:
  - (1) State clearly the question(s) that the applicant wishes resolved;
  - (2) Cite the provisions of law under which the question arises; and
  - (3) State all facts which the applicant believes to be material. 16 C.F.R. § 1.2.
- The identity of the companies or other persons involved must be disclosed.
- The request letter and the materials submitted by the requesting party are placed on the FTC's public record when the opinion letter is issued. 16 C.F.R. § 1.4.
- Staff may disclose the basic facts relating to a proposal to third parties from whom we seek information during consideration of a request.

# Can the Commission protect confidential information?

- Yes, if the information is exempt from disclosure under FOIA or other law. 16 C.F.R. § 1.4.
- Requests for confidential treatment should specifically describe the basis for nondisclosure.
- There are no confidential opinions. The opinion must be made public, and it must describe the proposed conduct in sufficient detail to support the analysis.

# Are opinions binding on the Commission?

**No.**

- “Advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest so requires, to rescind or revoke the action. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission’s advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission’s advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission’s approval.” 16 C.F.R . § 1.3 (b).
- The Commission can rescind staff advice and, where appropriate, commence an enforcement proceeding. 16 C.F.R . § 1.3 (c).
- To my knowledge, the Commission has not rescinded any advisory opinion.

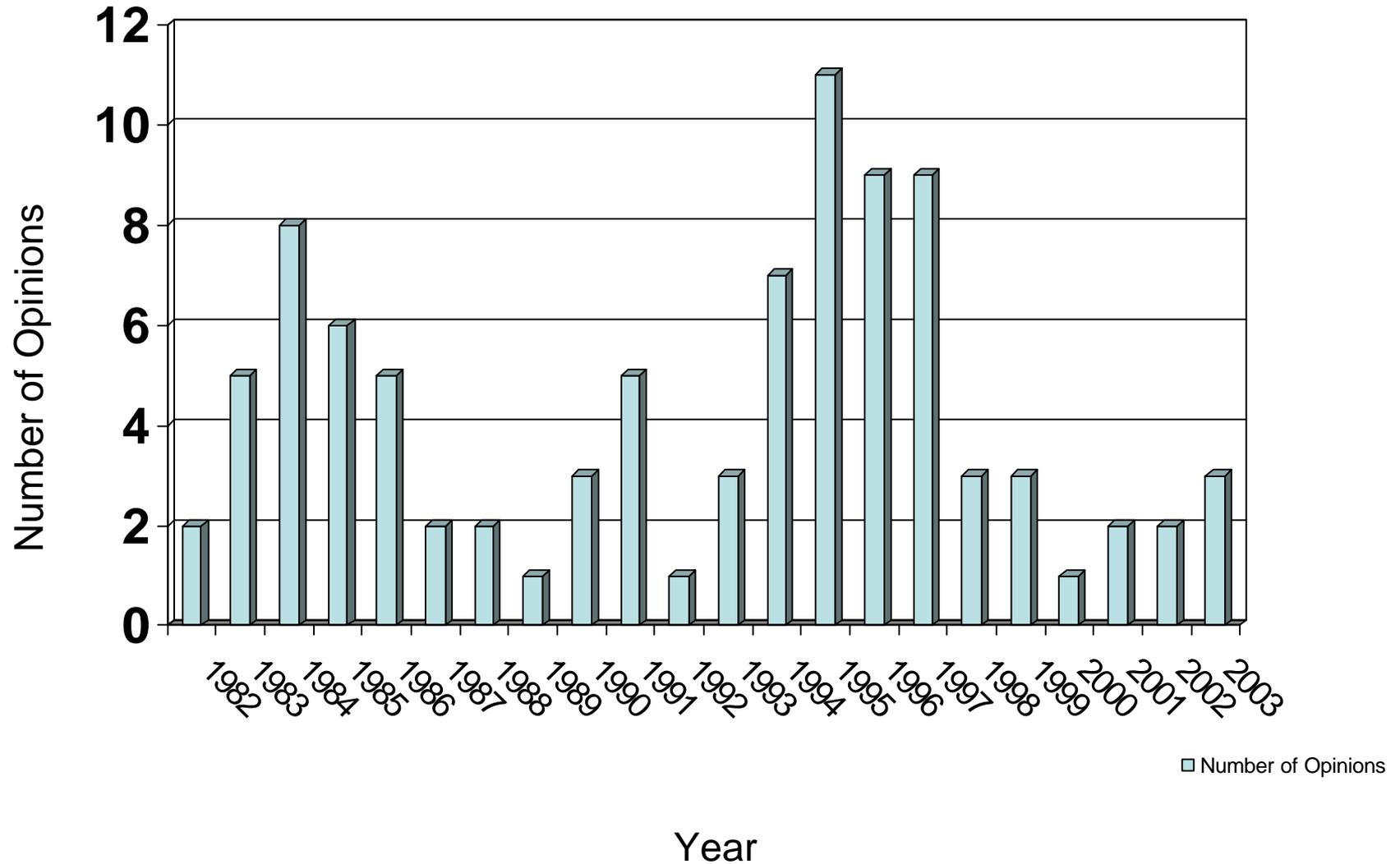
# How long does it take to get an opinion?

- In the *Statements of Antitrust Enforcement Policy in Health Care*, the agencies committed to responding to requests within certain time frames after "all necessary information is received:"
  - (1) 90 days regarding any matter addressed in the Statements, except hospital mergers outside the safety zone and multiprovider networks;
  - (2) 120 days regarding multiprovider networks and "other non-merger health care matters."
- In practice, how long it takes depends on how much information we need to get make a judgment, and how complicated the issues are.

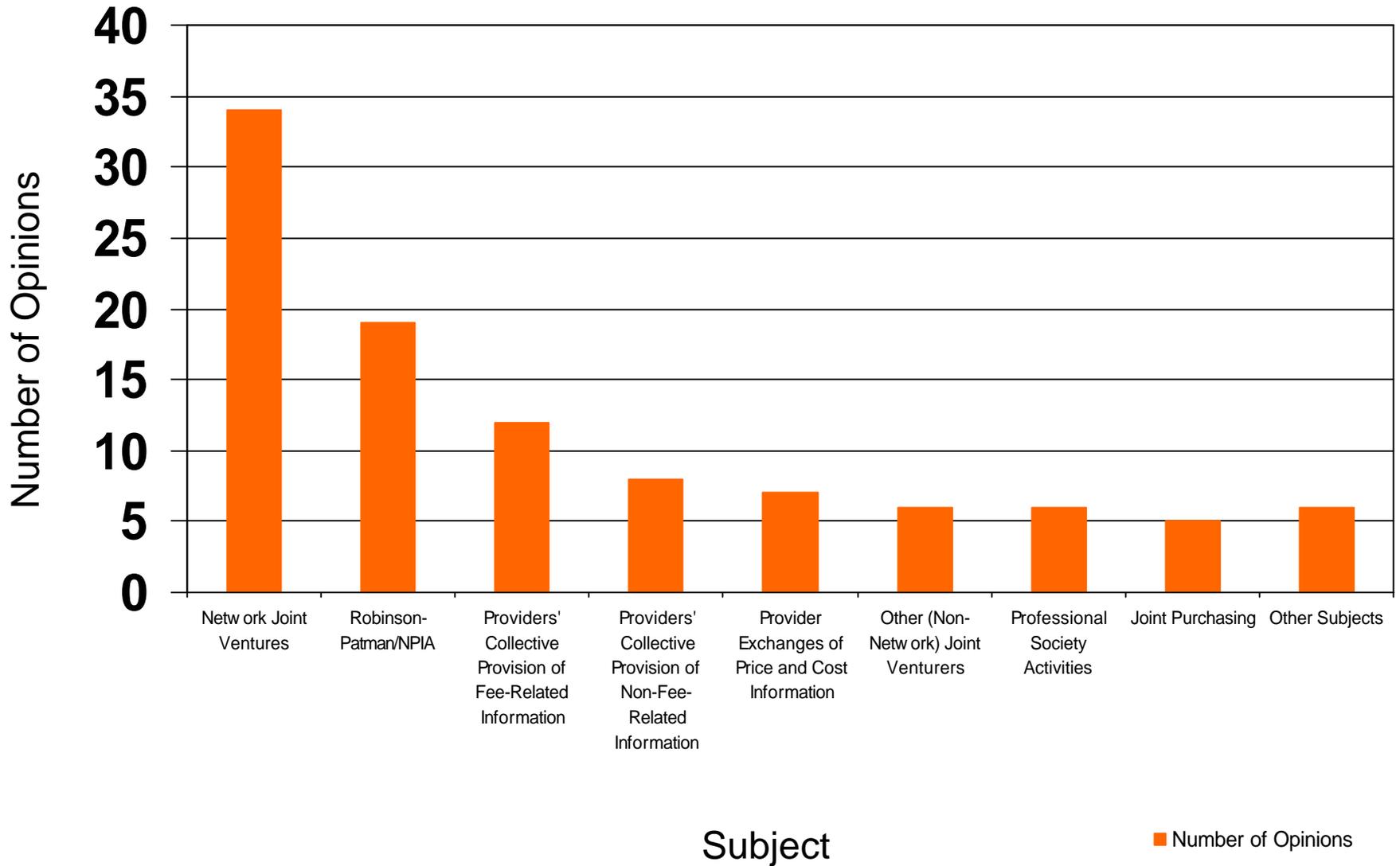
# What is reasonable to expect an opinion to do?

- The process is best suited to questions concerning the Commission's or staff's legal analysis of particular types of conduct, where the facts concerning market definition are fairly clear and market power is not likely to be present.
- We do not routinely investigate to verify information provided to support geographic or product market definition or market share. The conclusions in the opinion letter are conditioned on the accuracy of the factual representations made in the request.
- In some circumstances, we seek information on a voluntary basis from third parties. But we cannot compel third party cooperation, and may not have access to information from all relevant sources.
- We usually do not have enough information to resolve purely factual issues.

# Number of Advisory Opinions by Year

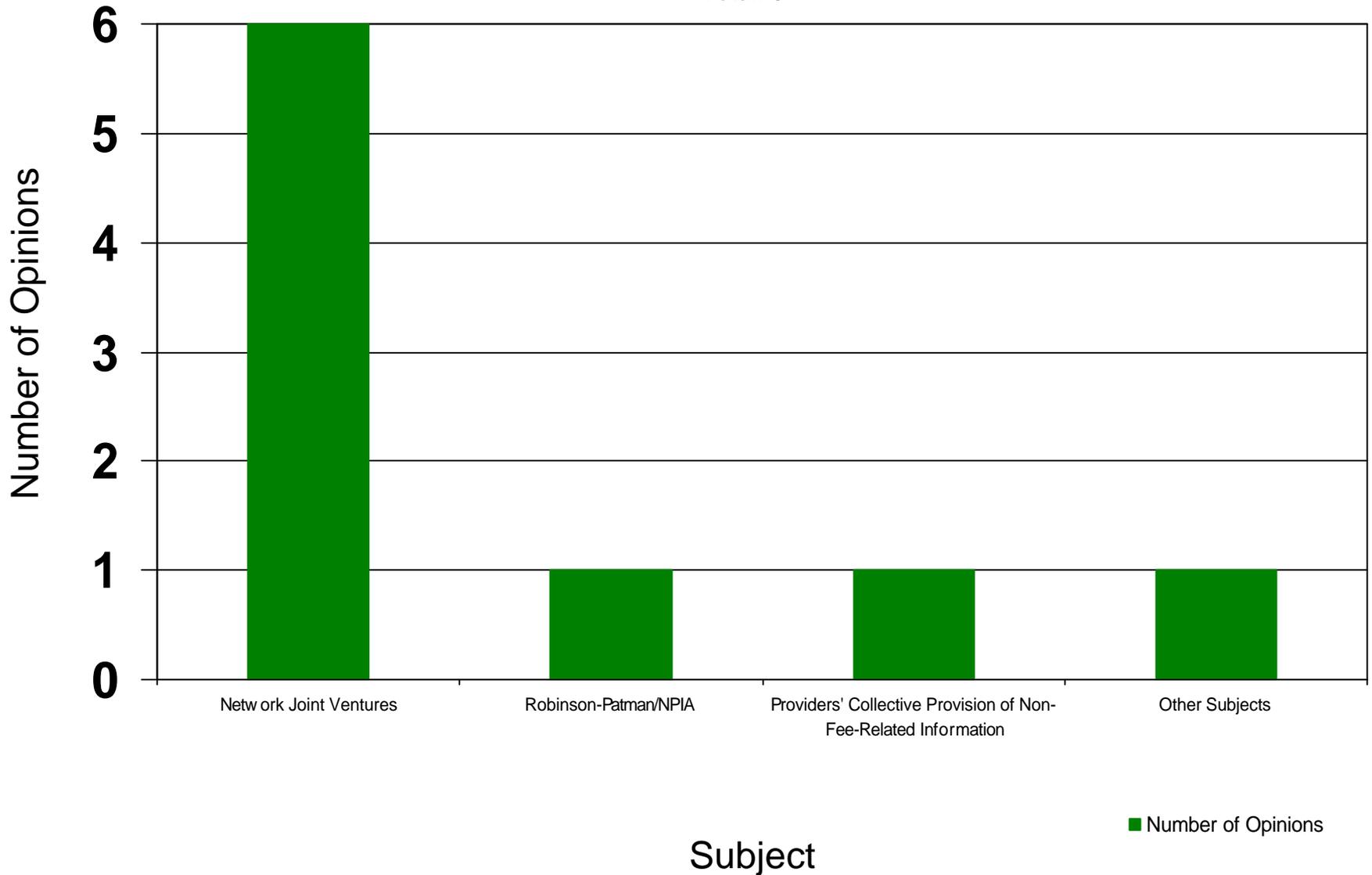


# Distribution of Advisory Opinions by Subject



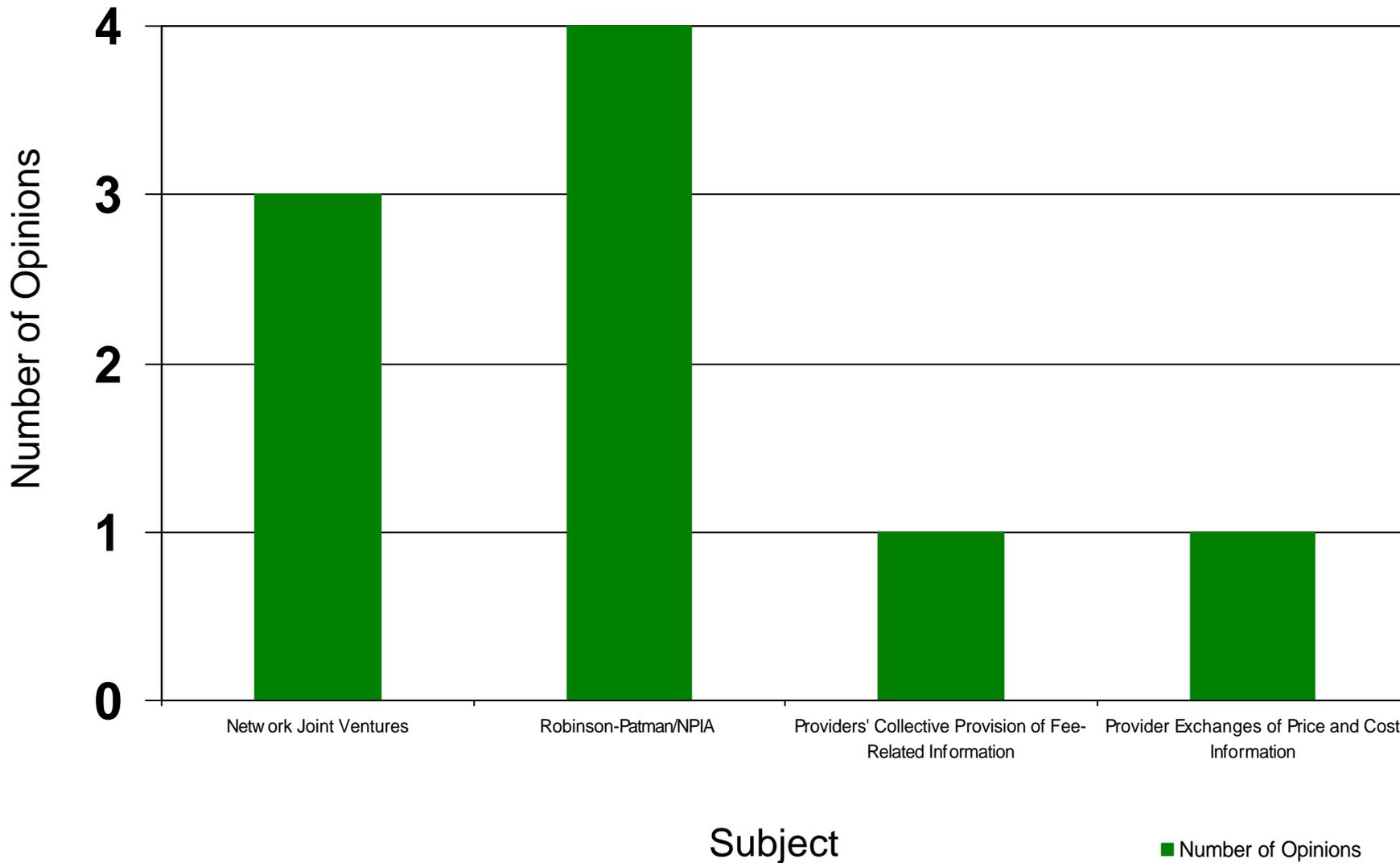
# Distribution of Advisory Opinions by Subject, 1997

Total: 9

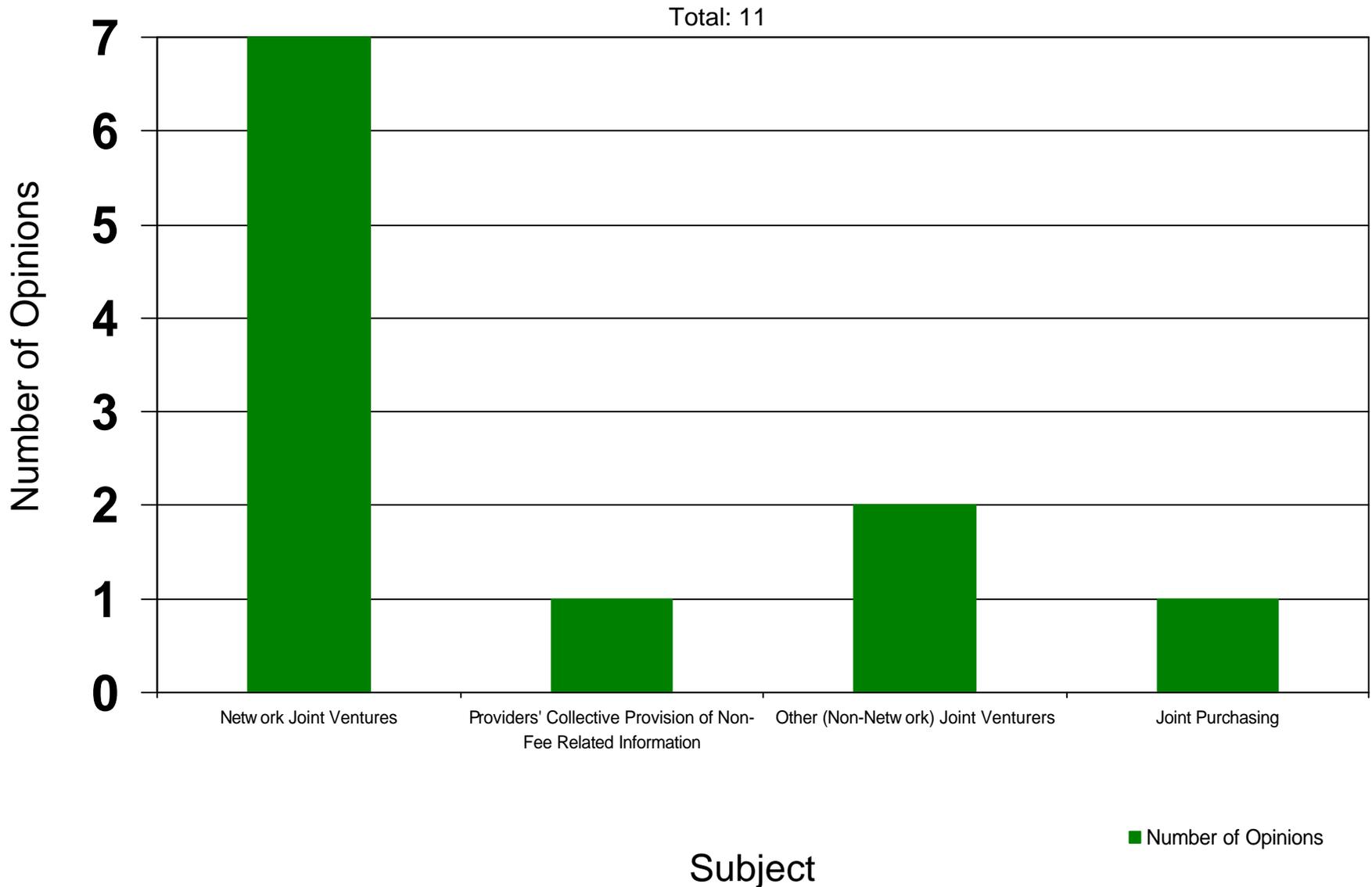


# Distribution of Advisory Opinions by Subject, 1996

Total: 9

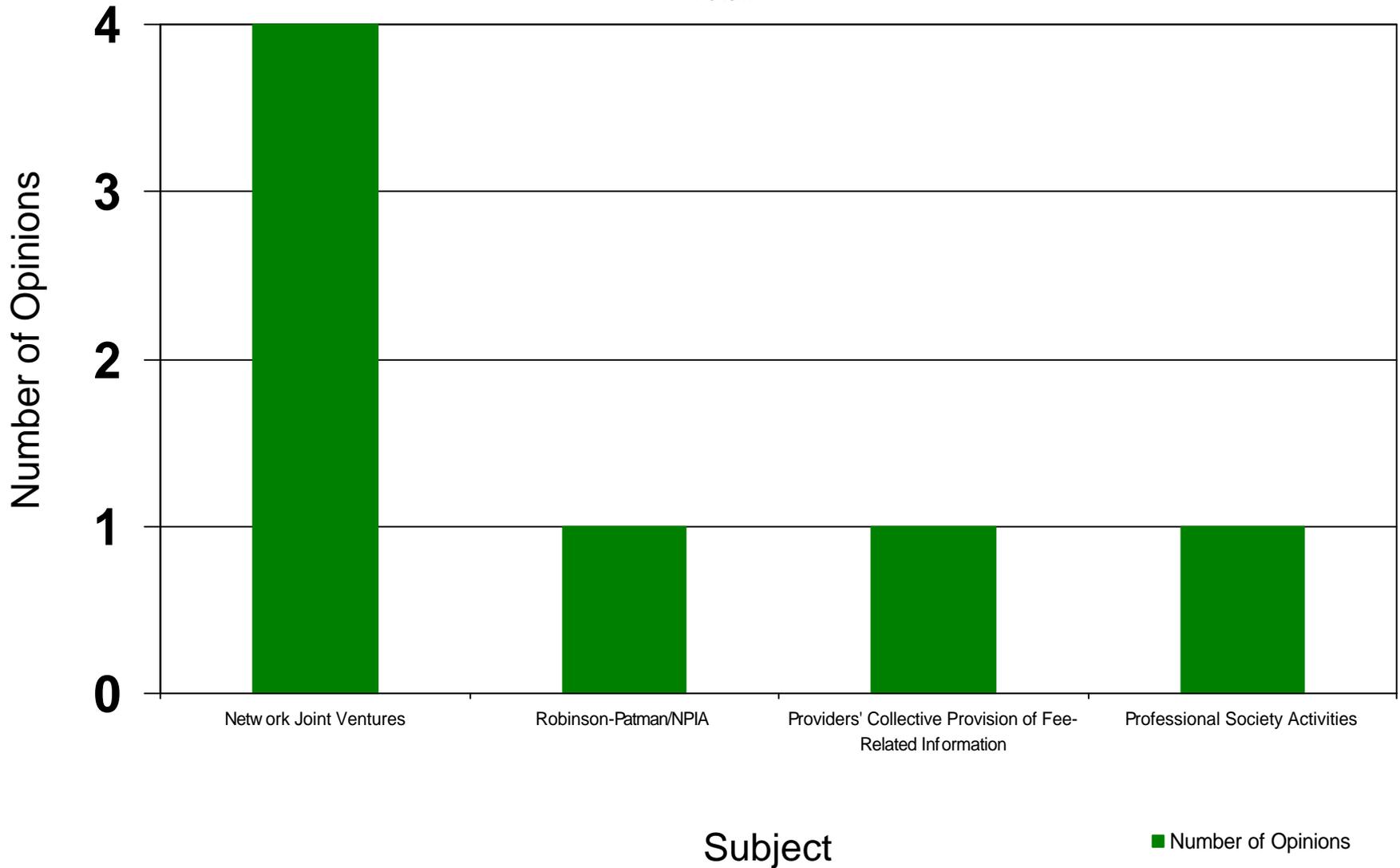


# Distribution of Advisory Opinions by Subject, 1995

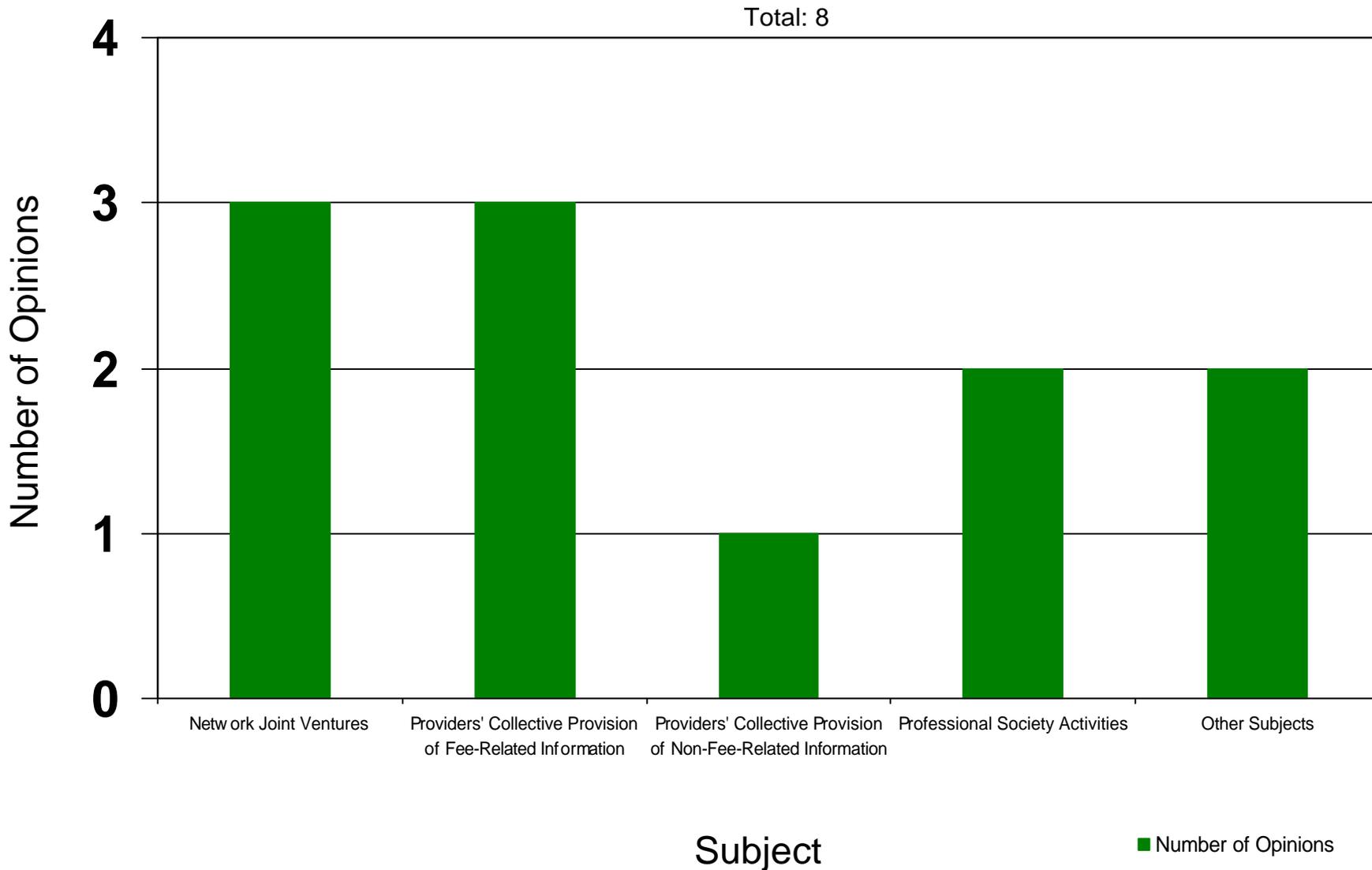


# Distribution of Advisory Opinions by Subject, 1994

Total: 7



# Distribution of Advisory Opinions by Subject, 1984



# Distribution of Advisory Opinions by Subject, 1985

Total: 6

